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No. 03-1238

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IBP, INC.,

Petitioner,

v.

GABRIEL ALVAREZ, individually and as a class representative; RANULFO GUTIERREZ, individually and as a class representative; PEDRO HERNANDEZ, individually and as a class representative; MARIA MARTINEZ; RAMON MORENO; ISMAEL RODRIQUEZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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INTRODUCTION

In its opening brief, petitioner demonstrated that Section 4(a)(1) applies, by its plain terms, to the walking time at issue in this case: it excludes from the mandatory compensation requirements of the Fair Labor Standards Act ("FLSA") all time respondents spend walking "to and from" their work stations, which is the "actual place of performance of the principal activity or activities [they are] employed to perform," *i.e.*, meat processing. 29 U.S.C. § 254(a)(1). Nevertheless, respondents and the government contend that this Court dictated a contrary result 50 years ago, in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). *Steiner*, they claim, necessarily held that, when integral and indispensable to a principal activity, clothes-changing is itself a principal activity that triggers the start of the workday, thereby rendering all subsequent walking compensable.

This central theory is mistaken. *Steiner* involved the scope of Section (a)(2) and the meaning of the terms "preliminary" and "postliminary," not the scope of subsection (a)(1). Indeed, the precise holding in that case identified periods of pre- and post-shift time that necessarily included the very time at issue here—time between compensable clothes-changing and the work station—and stated such time was not mandatorily compensable if excluded by subsection 4(a)(1). Thus, *Steiner* does not announce the rigid rule respondents and the government advocate.

Respondents' rule, moreover, cannot be reconciled with a long-standing regulation that acknowledges that, even where clothes-changing is mandatorily compensable, time spent walking between the locker room and the work station is not. Nor can it be reconciled with even older pronouncements, in which the government long ago recognized that compensable activities may occur outside the workday. And, as petitioner has shown, respondents' rigid approach leads to anomalies that Congress could never have intended.

In short, respondents and the government have failed to refute petitioner's showing that the decision below should be reversed.

I. TIME SPENT WALKING BETWEEN INTEGRAL AND INDISPENSABLE CLOTHES-CHANGING AND THE WORK STATION IS NOT COMPENSABLE UNDER SECTION 4(a) OF THE PORTAL ACT.

The text, purpose, and history of Section 4 of the Portal Act all point to the inescapable conclusion that the time employees spend walking between compensable pre- and post-shift clothes-changing and their actual work stations is not subject to mandatory compensation under the FLSA.

A. The Text Of Section 4(a)(1) Of The Portal Act Makes Clear That The Walking Time At Issue Here Is Not Compensable.

In determining statutory meaning, as this Court has "repeatedly held, the authoritative statement is the statutory text." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, — U.S. —, 125 S. Ct. 2611, 2626 (2005); *accord Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Although neither the Ninth Circuit below, nor respondents or their *amici*, confront the full text of Section 4(a)(1), that text makes plain that the walking time at issue here is not subject to mandatory compensation.

Section 4(a)(1) provides that "no employer shall be subject to any liability or punishment" for failure to compensate employees for:

> (1) walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform,
>
> . . .

> which occur[s] either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a).

This language resolves the question presented. The phrase "actual place of performance" necessarily refers to the place where the employee performs the important or consequential task (or tasks) he or she "is employed to perform." Pet. Br. 14-16.[1] Here, the "actual place" where respondents perform their "principal activity" of processing meat is the work station where they engage in that processing—not the locker room or cafeteria where they retrieve and don protective clothing. Under Section 4(a)(1)'s plain terms, therefore, the time respondents spend "walking . . . to and from" their work stations—the "actual place of performance of the principal activity or activities which [they are] employed to perform"—is excluded from mandatory compensation. 29 U.S.C. § 254(a)(1).

The government's contrary argument that the locker room is the actual place of performance makes no sense and unravels its textual argument. Specifically, the government suggests that, "[o]nce it is accepted that integral and indispensable donning and doffing are principal activi-

[1] Cases such as *Carter* v. *Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), and *Ralph* v. *Tidewater Construction Corp.*, 361 F.2d 806 (4th Cir. 1966)—although not involving compensable pre- and post-shift clothes-changing—adopt this plain meaning, observing that the "actual place of performance" of locomotive operators' principal activity "is the locomotive itself," not the assignment board they checked before walking to the locomotive, 463 F.2d at 1294, and that, for employees constructing a bridge, the "actual place of performance" was the bridge itself, not the dock where employees boarded a boat for daily rides to and from their work sites, 361 F.2d at 808-09. The definition of the term "actual place of performance" is not altered simply because an employee's arrival at that location is preceded by compensable pre-shift clothes-changing.

ties . . . , it necessarily follows that those activities occur in the actual place of performance of principal activities." U.S. Br. 16. But the government's premise ignores critical statutory text.[2] The fact that an activity, such as clothes-changing, is integral and indispensable to a principal activity, such as meat processing, does not mean that clothes-changing is itself "the principal activity or activities which [an] employee *is employed to perform*." Although the Ninth Circuit concluded that certain clothes-changing is integral and indispensable to respondents' principal activities, that conclusion (which this Court declined to review) does not alter the facts that respondents are not "employed to perform" clothes-changing, and that the locker room is not "the actual place of performance" of the activity for which they were hired.

For these same reasons, there is no merit to the government's related argument that there is "no textual anchor" for excluding pre- and post-shift walking time from the FLSA's mandatory compensation requirements. U.S. Br. 17. Use of the "shift" as a temporal dividing line—which is the concept the Court employed in *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956); see also *infra* at 6-8—simply reflects that, in many industrial settings, the activities during the shift are those "which [the] employee is employed to perform." 29 U.S.C. § 254(a)(1). While other activities outside the shift may be compensable, walking is not when it is "to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." *Id.*

Nor does respondents' suggestion that there may be more than one principal activity save their argument. See Resp. Br. 17-20. Petitioner has never denied that an employee may be hired to perform more than one principal activity. Indeed, the

[2] The government's argument also ignores its own regulations, which have long made clear that a locker room in which an employee engages in compensable clothes-changing is not the "actual place of performance of the principal activity . . . which such employee is employed to perform." *See infra* at 13-15.

text of the statute expressly refers to "principal activity or activities," and petitioner recognized that possibility in its opening brief. See, *e.g.*, Pet. Br. 15. But that phrase does not transform all integral and indispensable activities into the important and consequential tasks the employee "is employed to perform." To the contrary, the text simply acknowledges that an employee may be hired to perform more than one principal activity. For example, an employee might be hired to perform both the tasks of processing meat and cleaning saws for other employees. In such a circumstance, the employee was hired to perform two principal activities. To include all integral and indispensable tasks under this rubric, however, would turn the phrase "which such employee is employed to perform" into a meaningless tautology in which the statutory duty to compensate would determine what work the employer hired the employee to perform.

In short, regardless of whether respondents are entitled to compensation for certain pre- and post-shift clothes-changing activities, those activities occur before and after respondents' arrival at or departure from the "actual place of performance of the principal activity or activities" they are "employed to perform": meat processing. Accordingly, under the plain terms of Section (a)(1), such pre- and post-shift walking time is excluded from mandatory compensation and is thus compensable only as required by contract, custom, or practice. See also Chamber Br. 10-13 (explaining how the Portal Act was structured to encourage bargaining over walking time and other pre- and post-shift activities).

B. Nothing In *Steiner* Justifies Departing From The Plain Meaning Of Section 4(a)(1).

As petitioner previously demonstrated, this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), confirms that the walking time at issue here is not subject to mandatory compensation. See Pet. Br. 16-20. Respondents' reliance on *Steiner*—a case involving subsection 4(a)(2)—to foreclose the plain reading of subsection 4(a)(1) is unavailing.

Most notably, *Steiner* did not state that the employees who worked at the battery-producing plant in that case had two principal activities, clothes-changing and producing batteries, and thus more than one "actual place of performance" for these principal activities. Instead, the Court referred to the production of batteries as the employees' "principal activity," and noted that this activity occurred on the production line. 350 U.S. at 249, 251-52.

Nonetheless, respondents and the government rely on two passages in *Steiner* in an attempt to show that the Court meant that clothes-changing was itself a "principal activity," and not merely an activity that was compensable because it fell outside the scope of subsection (a)(2)'s exclusion of pre- and post-liminary activities. First, they cite the Court's statement of the issue: "whether workers in a battery plant must be paid as a part of their 'principal' activities for time incident to changing clothes at the beginning of the shift and showering at the end" or "whether these activities are 'preliminary' or 'postliminary' within the meaning of the Portal-to-Portal Act." *Id.* at 248; see Resp. Br. 18-19; U.S. Br. 13. Second, they rely on the Court's statement, at the outset of its analysis, that it agreed with the court of appeals that "'principal activity or activities' in Section 4 embraces all activities which are 'an integral and indispensable part of the principal activities,' and that the activities in question fall within this category." 350 U.S. at 252-53 (footnote omitted); see Resp. Br. 31; U.S. Br. 13.

Neither of these statements, however, reflects the holding in *Steiner*, which recognized a narrow exception to subsection (a)(2). Rather, the Court's actual holding was more precise:

> We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act *if* [1] those activities are an integral and indispensable part of the principal activities for which covered workmen

are employed *and* [2] are not specifically excluded by Section 4(a)(1).

350 U.S. at 256 (emphasis added); see Pet. Br. 16-20.

The first proviso reflects the Court's understanding that there are, on the one hand, "principal activities *for which covered workmen are employed*," and also, on the other hand, activities "integral and indispensable" to those principal activities. 350 U.S. at 256 (emphasis added). Thus, the Court understood that, whether or not they should be compensated for clothes-changing, the employees were not employed to change clothes. Rather, they were employed to produce batteries, which was their principal activity. This understanding is reflected on numerous occasions in the decision.[3] Because clothes-changing was "integral and indispensable" to this principal activity it was "compensable," but it was not itself transformed into a principal activity "for which covered workmen [were] employed." *Id.*

Moreover, recognizing that such pre-shift activities may be compensable does not mean that they necessarily trigger the workday rule. Had the Court understood that integral and indispensable activities commenced the workday, it could and would have said that all activities performed any time "before or after the regular work shift, on or off the production line," are compensable if they are integral and indispensable to a principal activity *or* occur after the first and before the last such integral and indispensable activity. Instead, it held that pre- and post-shift activities are compensable if they are

[3] *See* 350 U.S. at 249 (clothes-changing was integral and indispensable to "the production of batteries, *the 'principal activity' in which these employees were engaged*"); *id.* at 248 (clothes-changing and showering were "work performed before or after the *direct or productive labor for which the worker is primarily paid*"); *id.* at 251 (clothes-changing is indispensable "to the performance of their *productive work*"); *id.* at 255 (referring to "preparatory activities *closely related to* the principal activity and indispensable to its performance") (all emphases added).

integral and indispensable to a principal activity *and* not excluded by Section 4(a)(1). *Id.*

Respondents and the government argue that the second proviso "simply means that walking that precedes the first principal activity or follows the last principal activity cannot itself be a compensable principal activity based on the theory that it is an integral and indispensable part of those principal activities." U.S. Br. 17; see Resp. Br. 33 (Section 4(a)(1) "only underscores that a party can no longer successfully contend that walking, riding or traveling to the first principal activity is itself integral and indispensable to performing that first principal activity"). But that is *not* what *Steiner* says. The Court referred to activities that occurred "*before or after the regular work shift, on or off the production line*," 350 U.S. at 256 (emphasis added), not to activities that occurred "before or after the first or last principal activity." The Court's temporal specification inescapably includes walking that occurred between the clothes-changing place and the "shift" or "production line," and it therefore necessarily places the walking at issue here (no less than the walking from the plant gate to the clothes-changing place) outside the scope of mandatory compensation under the FLSA.

Thus, nothing in *Steiner* compels the conclusion that the walking time at issue here is subject to mandatory compensation under the FLSA.[4] To the contrary, *Steiner* supports petitioner's plain reading of the Portal Act as excluding the pre- and post-shift walking time at issue here.[5]

[4] Similarly, in reiterating *Steiner*'s core holding, *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), also recognized that, even if certain pre- and post-shift activities (such as knife sharpening) were compensable because they were integral and indispensable to the principal activity the employee was hired to perform, Section 4(a)(1) still excluded related pre- and post-shift walking time from mandatory compensation. *Id.* at 261.

[5] Respondents argue that this Court already has definitively concluded that Section 4 is ambiguous in all contexts. *See* Resp. Br. 19; *see also* U.S. Br. 12. The ambiguity *Steiner* identified, however, was whether, in

C. The History And Purpose Of The Portal Act Confirm That The Walking Time At Issue Here Is Not Compensable.

Although the Court does not need additional evidence to conclude that the walking time at issue here is not subject to mandatory compensation, the history of the Portal Act supports petitioner's reading of Section 4(a)(1). In this regard, it is noteworthy that respondents and their *amici* all but ignore the historical context in which Section 4 of the Portal Act was enacted. That history confirms that Congress intended all pre- and post-shift walking to be uncompensated except by contract, custom, or practice.

Notably, respondents virtually ignore *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)—"the famous case that launched the Portal-to-Portal legislation," *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1292-93 (D.C. Cir. 1972). In *Anderson*, having no congressional guidance, the Court reasoned (in striking similarity to the core rationale of the Ninth Circuit below) that pre- and post-shift walking time was entitled to compensation because, "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and the employees "walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business." 328 U.S. at 691. Respondents do not deny the resulting flood of litigation or that Congress responded quickly and decisively to rein in the effects of *Anderson*. See Pet. Br. 3-5, 21-26.

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certain circumstances, pre- and post-shift clothes-changing falls outside the scope of "preliminary" or "postliminary" activities in Section 4(a)(2). 350 U.S. at 248; *see id.* at 254-56. This case does not involve the meaning or scope of those terms or of Section 4(a)(2). The question here turns on the meaning of Section 4(a)(1), which is plain. Indeed, in *Steiner*, the Court saw no ambiguity in the concept of "the principal activity or activities which such employee *is employed to perform*," *see supra* at 7 & n.3, and it expressly identified pre- and post-shift walking time as time not subject to mandatory compensation, *see* 350 U.S. at 256.

Nonetheless, respondents and the government suggest that Congress's response to *Anderson* was fully encompassed by Section 2 of the Portal Act—a provision that precludes mandatory compensation for "any activity of an employee engaged in prior to May 14, 1947," 29 U.S.C. § 252(a). See Resp. Br. 13-14, 34; U.S. Br. 3, 25 ("Congress fully addressed [the post-*Anderson*] emergency by enacting Section 2 of the Portal Act"). This attempt to divorce Section 4 from its historical origins is unsupportable. For example, Senator Cooper, on whom this Court relied in *Steiner*, made clear that in addition to addressing retroactive claims in Section 2, "[o]ur second decision was, that it was necessary to legislate as to the future. If we did not, the same conditions which prevail today would occur again, with all the resulting uncertainty, with all the resulting litigation." 93 Cong. Rec. 2287, 2293 (1947).

Senator Donnell, one of the Senate Managers involved with the Conference Report, echoed this understanding, observing that what became Section 4 addressed "claims with respect to which this vast uncertainty has arisen in our economy" after *Anderson*. 93 Cong. Rec. 2176, 2181 (1947). Thus, the government's suggestion that Congress "fully addressed [the *Anderson*] emergency by enacting Section 2 of the Portal Act," U.S. Br. 25, is irreconcilable with this legislative history.

Section 2, in removing "any activity" from mandatory compensation, went beyond the scope of *Anderson* and was designed to stop the immediate hemorrhaging of time and resources into existing litigation; Section 4 was a direct response to the over-breadth of *Anderson*. And, in direct reaction to *Anderson*, a primary purpose of Section 4 was to ensure pre- and post-shift walking time was not subject to mandatory compensation. As Senator Cooper stated with precision and without qualification:

> The committee decided, first, that we should make noncompensable, walking, riding or traveling to and

> from the actual place of performance of the principal activities which such employee is employed to perform. Then, clearly and definitely, *as to the future*, an employee *cannot receive compensation* for *any* walking, riding or traveling time to the actual place of performance where he begins his actual activities.

93 Cong. Rec. at 2297 (emphases added).

Respondents' only response is to assert that Senator Cooper also stated, elsewhere in the legislative history, that the "term principal activity or activities includes all activities which are an integral part thereof." Resp. Br. 38 (internal quotation marks omitted) (quoting *Steiner*, 350 U.S. at 257 (quoting legislative history)). Nothing in that general observation, however, detracts from the more specific and categorical prohibition of compensation for walking time to and from the actual place of performance. See Pet. Br. 23-26. Indeed, when the Senator addressed the precise integral and indispensable activity at issue here—clothes-changing—he stated only that "'the time used in changing into those clothes would be compensable as part of [the employee's] principal activity,'" *Steiner*, 350 U.S. at 258 (quoting legislative history). He did not address the compensability of related walking time, let alone contradict his categorical statement that an employee cannot receive compensation for "any walking . . . time to the actual place of performance where he begins his actual activities."[6] Senator Donnell's statements on the floor reinforce that categorical view, explaining:

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[6] Respondents also try to dismiss earlier comments that Senator Cooper made when he explained why the phrase "actual place of work" was too vague. Resp. Br. 38 n.21. Although the drafters did not adopt the Senator's proposed solution, their subsequent adoption of the far more precise phrase "actual place of performance of the principal activity or activities which such employee is employed to perform" shows that they *shared* his concern, and sought to ensure that walking to and from the place where the productive work takes place is not mandatorily compensable. *See* Pet. Br. 25-26.

> So as we look forward into the future an employee finds, first, that his activities in walking, riding, or traveling to and from the actual place of the performance of his principal activity—for instance, walking to the lathe which he operates, the walking taking place from the door of the plant up to the lathe—are not compensable. The employee is not entitled to compensation for any of those processes of walking, riding, or traveling

—unless, of course, they are subject to compensation by contract, custom, or practice. 93 Cong. Rec. at 2181 (statement of Sen. Donnell).

Respondents' reliance on the notion of the "workday" with respect to future claims also fails. See Resp. Br. 35-39; U.S. Br. 26 ("The only way in which Congress sought to cut back on existing law was by excluding from compensation preliminary or postliminary activities and walking that occur outside the workday."). The Senate Report explains that the use of the term "workday" in the context of the Portal Act has a specific meaning: "this report uses the term 'workday' to mean *that period of the workday* between the commencement by the employee, and the termination by the employee, of the principal activity or activities w*hich such employee was employed to perform*." S. Rep. No. 80-48, at 47 (1947) (emphases added). Thus, the term "workday," as used in the legislative history of the Portal Act, encompasses only those principal activities which an employee was employed to perform. See *id.*

In fact, an example from the legislative history that respondents cite highlights this point. See Resp. Br. 39. They refer to the case of a worker in a textile mill, who is required to report 30 minutes before other employees to distribute clothing to other employees and ready the machines for operation by other employees. The Senate Report concludes not that such activities are "integral" to the employee's principal activity (as it does when describing the

preparatory acts of a lathe worker) but that they "are among the principal activities of such employee." S. Rep. No. 80-48, at 48, *quoted in* 350 U.S. at 257. Thus, this textile mill employee is employed to perform two principal activities: preparing the factory and producing garments. Finding the walking time here noncompensable, by contrast, is fully consistent with that example. Respondents here are not employed for the purpose of changing clothes, but the garment worker was employed to ready the mill.

The other example in the report (a worker who cleaned a lathe) involved a situation in which the employee did not have to walk after this integral activity to the place where he performed the principal activity he was hired to perform. The employee was already at that place (his lathe). Thus, the example does not address the compensability of walking time that occurs between a compensable activity and the place where the employee performs the tasks he or she was "employed to perform."

D. Agency Interpretive Guidance Buttresses Petitioner's Reading Of Section 4(a)(1).

The agency's interpretive guidance further supports petitioner's plain reading of Section 4(a). Most apposite is 29 C.F.R. § 790.7(g) n.49, which expressly acknowledges that even if "the changing of clothes may in certain circumstances be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity,'" and therefore compensable:

> [t]his does not necessarily mean, however, that travel between the . . . clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

Id. (citing colloquy between Senators McGrath and Cooper). Like this Court's decision in *Steiner*—which also relied

extensively on colloquies between Senators McGrath and Cooper—the agency's explanation makes clear that a compensable "integral and indispensable" activity does not render compensable all time spent walking between that activity and the actual work station. See *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 280 (1st Cir. 2004) (relying on this provision to reach a result contrary to that of the court below), *cert. granted*, 125 S. Ct. 1295 (2005). The efforts of respondents and the government to dismiss footnote 49 are unavailing.

Although respondents and the government suggest that the footnote is ambiguous, Resp. Br. 26-27; U.S. Br. 23, footnote 49 makes unmistakably clear that a locker room is not "the actual place of performance" of the principal activity. 29 C.F.R. § 790.7(g) n.49. Immediately after stating that clothes-changing can be regarded as an "integral part of [an] employee's 'principal activity,'" the regulation states that "[t]his does not necessarily mean, however, that travel between the . . . clothes-changing place and *the actual place of performance of the specific work the employee is employed to perform*[] would be excluded from" Section 4(a)(1). *Id.* (emphasis added). The clear import of this sentence is that the "clothes-changing place" is *not* the "actual place of performance of the principal activity," and that clothes-changing is not the principal activity "the employee is employed to perform." The sentence is thus flatly inconsistent with respondents' claim that such walking is "'from the place of performance of one principal activity to the place of performance of another.'" Resp. Br. 26 (emphasis omitted) (quoting 29 C.F.R. § 790.7(c)).[7]

[7] Respondents and the government say that footnote 49 simply "reserve[s] the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act." U.S. Br. 23; Resp. Br. 27. But, under their view, there is no such possibility, and neither respondents nor the government identify how one could arise if, as they claim, any clothes-changing that is integral and

The government argues that footnote 49 cannot obscure what is clear, then cites its regulatory syllogism that (1) the Portal Act has no effect on walking that occurs during the workday, (2) the workday begins with the first principal activity and (3) integral and indispensable activities are themselves principal activities. U.S. Br. 24 (citing 29 C.F.R. §§ 790.6(a)-(b), 790.8(b)-(c)). In fact, this regulatory syllogism fails. Although Section 790.8 does deem integral and indispensable activities to be principal activities, it cites back to footnote 49 when applying this principle to clothes-changing. See 29 C.F.R. § 790.8(c) n.65. Thus, the very regulations the government cites for its syllogism acknowledge that walking time that comes between indispensable clothes-changing and the actual place where an employee performs the tasks for which he or she was hired is not necessarily compensable. The government's own regulations, therefore, are inconsistent with the categorical rule respondents and the government purport to derive from them. Indeed, as just noted, footnote 49 recognizes that the relevant "principal . . . activities" are those the employee "is employed to perform," and that clothes-changing does not fall within that category—a recognition reflected in other relevant regulations that further buttress petitioner's reading of Section 4(a)(1) by referring only to those places where employees perform the productive tasks for which they were hired as "the actual place of performance."[8]

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indispensable to a principal activity is itself a principal activity that triggers the start of the workday.

[8] *See* 29 C.F.R. § 790.7(c) (referring to "the actual place where he does *what he is employed to do*") (emphasis added); *id.* § 790.7(e) (referring to employee's "workbench or other place where he commences the performance of the principal activity or activities"); *id.* (referring to "telephone lineman, a 'trouble-shooter' in a manufacturing plant, a meter reader, or an exterminator" as employees who perform their "principal activity at various places"); *id.* § 790.7(f) (referring to "the employee's lathe, workbench or other actual place of performance of his principal activity or activities"); *id.* § 790.6(b) (referring to situation where an

Ultimately, respondents and the government try to brush aside footnote 49 by arguing that the Court owes deference to the implausible "interpretation" in the government's brief. U.S. Br. 24 (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997)). But, even assuming *Auer* remains good law,[9] the interpretation set forth in the government's brief is not entitled to deference. Unlike the situation in *Auer*, see 519 U.S. at 462, the government here is defending its own litigation position in other cases, see U.S. Br. 21 n.3, 24. More fundamentally, an agency's interpretation must yield if it "is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation omitted). Whatever ambiguity there may be in footnote 49, it unambiguously acknowledges (1) that a locker room in which integral and indispensable clothes-changing occurs is *not* "the actual place of performance of the specific work the employee is employed to perform," and (2) that walking time that follows such clothes-changing may *not* be compensable. 29 C.F.R. § 790.7(g) n.49. The government's categorical view that integral and indispensable clothes-changing (1) renders the locker room an employee's "actual place of performance of the principal activity or activities which such employee is employed to perform" and (2) necessarily renders all related walking time compensable simply cannot be reconciled with the regulatory text.

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employee reports to "the actual place of performance of his principal activity" but, due to circumstances beyond his control, "he is not able to commence performance of his productive activities until a later time"); *see also id.* § 790.8(a) ("The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform'; they do not include noncompensable 'walking, riding, or traveling' of the type referred to in section 4 of the Act.") (footnotes omitted).

[9] *See, e.g.*, *Keys* v. *Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (noting that there is "[p]robably . . . little left of *Auer*" after *Christensen* v. *Harris County*, 529 U.S. 576, 587-88 (2000), which declined to grant *Chevron* deference to a Department of Labor opinion letter).

Finally, respondents and the government cannot take solace in the notion of a "continuous workday" or any regulations touching on that subject. Resp. Br. 25-26; U.S. Br. 18-22. As aptly described in the Chamber's brief, although a workday may be "continuous, *once it begins*[,] [t]here is no rule that also establishes the converse proposition that [the employees] urge, that all compensable time must occur during the 'workday.'" Chamber Br. 6. Indeed, the government has long recognized exceptions to the putative continuous workday rule. For example, a 1941 opinion from the agency recognized that a miner's compensable workday began upon arrival at the mine collar even though he was compensated for various prepatory tasks prior to the workday beginning. See Barber Foods Br. 30-31. Likewise, U.S. Department of Labor Interpretive Bulletin 13 (1939), see U.S. Br. 18-19, "expressly contemplates compensation outside the bounds of the workday." Chamber Br. 6 n.3. Thus, compensated pre- and post-shift clothes-changing do not ineluctably mark the start and stop of the workday such that all related walking time is also compensable.

II. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 4(a)(1) LEADS TO ANOMALOUS RESULTS AND THE KIND OF HARMS THE PORTAL ACT WAS DESIGNED TO AVOID.

As petitioner previously demonstrated, the Ninth Circuit's reading of Section 4(a)(1) also should be rejected because it would recreate the very problems that prompted passage of the Portal Act in the first place and lead to anomalous results. See *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 202-03 (2000) (courts should avoid interpretations that "create anomalous results" in light of the "practical consequences"); Pet. Br. 32-37. Although respondents quibble with the way in which the Ninth Circuit's rule may play out in this case, nothing in respondents' brief undermines the First Circuit's core observation that an "automatic rule that any activity that satisfies the 'integral and indispensable'

test itself starts the workday" "would lead to . . . absurd result[s]," *Tum*, 360 F.3d at 280—both in the cases under review and more generally.

First, respondents deny that the compensability of walking time under their rule would depend on the "fortuity" of where compensable gear is located, see Pet. Br. 32-33, because employers could purposefully reconfigure their facilities to reduce compensable walking time to achieve "efficiencies," see Resp. Br. 44-47; see also U.S. Br. 26-27. Respondents miss petitioner's point. If the Ninth Circuit's approach becomes the law of the land, employers likely would seek to "reengineer" their facilities to minimize walking time because, as respondents concede, such liability is tied to "the building's design." Resp. Br. 47. In some and perhaps many circumstances, such reengineering might not be practical. But even where it is, such reengineering would be dictated by a misreading of the statute, not notions of industrial efficiency. Given that the walk from the factory gate to the work station must happen anyway, any changes with respect to what portion of that walk would be compensated would not bring greater "efficiency" to the pre- and post-shift process or any benefit to employees, who would still walk the same distance. Instead, respondents' approach would encourage decisions to be made by an artificial effort to avoid liability for walking time Congress never intended to make compensable. See *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003); *Tum*, 360 F.3d at 285 (Boudin, C.J., concurring) (same); cf. *Anderson*, 328 U.S. at 690 (recognizing the problem of fortuity).

Second, respondents' approach creates incongruous and disparate effects on workers who perform similar work, but pick up the first piece of compensable gear at different locations, thereby inviting inevitable workplace discontent. See Pet. Br. 33-34. Respondents contend that these discrepancies are irrelevant within the context of this litigation because they were awarded a flat measure of

walking time. Resp. Br. 49. In making their argument, however, respondents prove petitioner's point: the award below was made "regardless of the manner in which [employees] actually" carry out their pre-shift activities. *Id.* Put another way, the district court awarded a uniform amount of walking time precisely because "there are considerable differences in how and where each employee dons and doffs his or her equipment." Pet. App. 54a.[10]

Third, the Ninth Circuit's approach leads to unexpected and large liabilities by permitting relatively short pre- and post-shift clothes-changing time to trigger large periods of intervening and mandatorily compensable walking time. See *Tum*, 360 F.3d at 284 (noting compensable walking time was "especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal"); Pet. Br. 35-37. Neither respondents nor the government deny this result.[11]

[10] The government's related contention that the district court awarded payment of uniform walking time as a "*remedial* measure" because petitioner failed to maintain records, *see* U.S. Br. 29-30 (citing Pet. App. 47a), is incorrect. Although respondents were permitted to *prove* their case through "representative evidence," *see* Pet. App. 47a, as shown, the district court awarded a uniform amount of walking time because it recognized that awarding actual time was unworkable, *id.* at 54a. This acknowledges the very discrepancies petitioner has raised. Moreover, the district court's award is irreconcilable with the continuous workday rule respondents and the government also claim governs this case, *e.g.*, U.S. Br. 29-30, because it ignores certain time employees spend walking within what they assert (incorrectly) is the compensable workday, *see* Pet. Br. 38. In short, there is no need to estimate the amount of walking time if it occurs during the compensable workday.

[11] Respondents simply question how many of them might be affected by the illustrative example mentioned by petitioner, but concede that there are employees in the Pasco plant who wear relatively little compensable protective clothing. *See* Resp. Br. 47-48. The government relies on its workday refrain, arguing that the walking at issue here falls within the ambit of the compensable workday and arguing implausibly (and contrary to the record in this case) that "all travel within the workday has the

These anomalous results are highlighted not only within the factual setting of this case, but in the myriad circumstances in which the Portal Act intersects with a variety of American workplace settings. See Chamber Br. 1-3, 13-14, 19 & nn.19 & 20; National Chicken Council Br. 2, 8-9. If, as respondents and the government urge, any compensable preliminary activity triggers compensation for all subsequent walking or travel to the actual place of performance of the main activity the employee is hired to perform, employers nationwide would face significant and unexpected liabilities. See *id.*[12]

At bottom, mandatory compensation of the walking time at issue here is not warranted under the text, history, or purpose of the Portal Act. Such arrangements should be left to private contract, custom, or practice. Congress did not intend to open the floodgates to pre- and post-shift walking time compensation. If there is to be any expansion of mandatory "walking time" compensation, "the proper venue for resolving that issue remains the floor of Congress." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 (1998).

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment of the Ninth Circuit should be reversed.

potential to be long in relation to the time spent 'actually working' at the destination." U.S. Br. 27.

[12] Ignoring the remainder of the American economy, respondents contend that the Court's adoption of their rule would not surprise the "meatpacking industry," because it "has been aware of these issues for more than 15 years." Resp. Br. 50. This is facially absurd given that the Ninth Circuit's decision below marked the first time a circuit court had adopted respondents' constricted view of the Portal Act.

Respectfully submitted,

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